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IN THE

Supreme Court of the United States

October Term, 1953.

No. 475

L. RONNEY & SONS FURNITURE MANUFACTURING COMPANY, a co-partnership consisting of SAM RONNEY and MILTON RONNEY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled cause, modifying and enforcing as modified an amended order of the National Labor Relations Board.

Opinions Below.

The opinion of the Court of Appeals [R. 1500-1519] is reported in 206 F. 2d 730. The original decision and order of the National Labor Relations Board [R. 111-126, 54-101] are reported in 93 N. L. R. B. 1049. The Board's supplemental decision and amendment of order [R. 127-131] are reported in 97 N. L. R. B. 891.

Jurisdiction.

The judgment of the Court of Appeals [R. 1520-1526] was entered on September 23, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), 28 U. S. C., Section 346, and 29 U. S. C. Supp. V, Section 160(e).

Questions Presented.

1. Whether the rule of *Virginia Electric & Power Co. v. Labor Board,* 314 U. S. 469, has been changed by the "free speech" proviso of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 158(c)); *i. e.,* whether the Labor Board may now make unfair labor practice findings on the basis of an employer's expressions of "views, argument, or opinion," which expressions are not coercive in themselves but which the Labor Board considers to be part of a course of conduct the legality of which is in question.

2. Whether the First Amendment and the "free speech" proviso of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 158(c)) permit the Labor Board to find an employer guilty of unfair labor practices upon evidence of any or all of the following communications to employees, whether such communications be considered alone or as part of a "course of conduct" or the "totality" of the employer's "activities":

(a) "Implying" or "stating" that a certain union is "nothing but a 'bunch of Communists and crooks'";

(b) "Disparaging" the union;

(c) "Belittling" the union's contract demands;

(d) "Emphasizing" that contract changes desired by the employer are moderate ones and that the claims of the union are too exacting;

(e) "Attempting to convince individual employees" that the union was wrong in telling them that the employer's job evaluation plan resulted in lower wages;

(f) "Arguing to employees" that the employer's plan is as good, if not better, than that of the union;

(g) "Attempting to prove to employees" that the contract offered by the employer to the union is better than the contract requested by the union;

(h) Stating that the employer has already made enough money to live on and is only keeping his plant open for the convenience of the employees.

3. Whether the Labor Board is authorized to find an employer guilty of unfair labor practice because he has, on the basis of equality, furnished one union information which another already has, viz.: employees' names and addresses.

4. Whether the Labor Board is authorized under Section 9(h) of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 159(h)) to issue a complaint on the basis of charges which were ostensibly filed by individuals but which were solicited, prepared, and prosecuted by a disqualified labor organization and which seek relief for the benefit of such labor organization and not merely for the ostensible charging parties individually.

5. Whether the order of the Labor Board is supported by its findings of fact and whether its findings of fact are supported by substantial evidence on the record con-

sidered as a whole, as required by Section 10(e) of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 160(e)).[1] The following are subsidiary questions under this heading:

(a) Whether the Labor Board is entitled to assume that certain employees would have been recalled after a plant shutdown in the absence of discriminatory intent on the part of the employer, where it appears without contradiction that the employer had previously made repeated attempts to discharge them ~~from~~ for inefficiency but was then prevented from doing so by contract restrictions on discharge.

(b) Whether, after finding that an employer "may have sincerely believed that CIO members would be unwilling to work for the wages it was prepared to pay after the plant reopened, and that it was therefore futile to call back any of its former employees," the Labor Board can properly conclude that the employer's failure to recall CIO members was motivated by illegal discriminatory intent.

(c) Whether the Labor Board can properly find that an employer has committed an unfair labor practice by recruiting employees through a certain union which is dominant in the particular industry, which has often supplied employees to the employer in the past, and which

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[1]Petitioner's counsel recognize that the writ of certiorari would not ordinarily issue to review this question if standing alone: *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498. But if the writ is granted they hope to be permitted to argue this question.

is able to furnish competent mechanics, while a rival union has been unable or unwilling to do so.

(d) Whether the Labor Board can properly find that in selecting employees the employer was motivated by intent to control the result of a future election, when the evidence does not show how, when the selection was made, the employer could have known whether an election would be held, or if so, when.

(e) Whether, in view of the 1947 labor law amendment (29 U. S. C., Supp. V, Sec. 159(h)), denying Communist unions access to Labor Board procedures, the Labor Board is authorized, in an unfair labor practice proceeding against an employer, to rely upon evidence of the employer's omission to notify the Labor Board of the claimed interest of a disqualified union in a pending representation proceeding.

(f) Whether, in view of the 1947 labor law amendment (29 U. S. C., Supp. V, Sec. 160(c)) forbidding reinstatement and back pay awards to individuals discharged for cause, the Labor Board is authorized to award reinstatement and back pay to individuals while refusing to make any finding upon substantial evidence of cause for their discharge.

Statute Involved.

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are printed in the appendix to this petition.

Statement of the Case.

Petitioner, a family partnership, operates a small furniture factory in Los Angeles, California [R. 57].[2]

Local 576, United Furniture Workers of America, hereinafter called "Local 576," was a labor organization affiliated with the Congress of Industrial Organizations at the time of the hearing before the National Labor Relations Board [R. 58].[3] The Labor Board's brief in the Court below conceded (p. 2) that "at no time material herein was Local 576 (CIO) in compliance with the non-Communist affidavit provisions of [the Labor-Management Relations Act, 1947]."[4]

Carpenters Locals 2488 and 3161 and the Carpenters District Council are labor organizations affiliated with the United Brotherhood of Carpenters and Joiners of America. The term "Carpenters Union" will hereinafter denote one or more of those organizations. The Carpenters Union is affiliated with the American Federation of Labor.

Local 576 procured ten individuals to file unfair labor practice charges against petitioner with the Labor Board.

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[2]Louis and Lillian Ronney, who were partners when this litigation began, have since died. The surviving partners are continuing the business.

[3]As petitioner offered to show the Labor Board and informed the Court of Appeals, Local 576 subsequently withdrew or was expelled from United Furniture Workers of America, and hence from the Congress of Industrial Organizations, because of the adherence of Local 576 to the Communist party "line" [R. 109-110; p. 3, brief of respondent in the Court of Appeals (petitioner here)].

[4]Labor Board counsel subsequently attempted to disavow that concession, asserted that Local 576 was in compliance, and urged upon the Court of Appeals as evidence thereof a certificate of a Board functionary purporting to state conclusions respecting the contents of official records to which petitioner is denied access.

[R. 537-538; Resp. Ex. 11—not printed.] The charges were drafted by Local 576 attorneys, who jointly with Government counsel prosecuted the complaint which issued thereon. [R. 54, 140.]

The charges alleged the commission of unfair labor practices affecting not only the nominal charging parties but others as well. Thus, in substantially similar language each charge alleged among other things that petitioners had "permitted and encouraged" the Carpenters Union "to solicit the undersigned employee *and other employees* into membership in said A. F. L. Union, and gave assistance to such solicitation by inducement, threat and coercion." The charges further alleged that "By other acts and conduct of the employer and its agents and representatives said employer interfered with, restrained and coerced the undersigned employee *and other employees* in the exercise of the rights guaranteed them in Section 7 of the [Labor-Management Relations] Act." (Emphasis supplied.) [R. 1-38.]

The complaint [R. 39-46] which issued on the basis of the charges alleged the commission of unfair labor practices not confined to the ostensible charging parties. Thus, in addition to alleging individual discrimination against the charging parties the complaint attacked a labor contract between petitioner and the Carpenters Union. And it specifically alleged as unfair labor practices the making of anti-Local 576 statements to employees generally. Counsel for the Labor Board conceded in their brief in the Court of Appeals that Local 576 is a beneficiary, although they say only an "incidental" one, of the Board's order which, among other things, directed petitioner to cease recognizing the Carpenters Union, giving effect to its labor contract, or interfering with the right of employees generally to join Local 576.

From 1936 to 1939 petitioner had a labor contract with the Carpenters Union. From 1939 to September 1, 1948, petitioner was under contract to Local 576. [R. 58-59.] Even while maintaining a contractual relationship with Local 576 petitioner was frequently required to call upon the Carpenters Union to furnish employees, for that union was dominant in the local "case goods" industry of which petitioner was a part and that union was willing and able (as Local 576 was not) to furnish competent mechanics. [R. 705, 707-708, 1408-1409.] Petitioner considered the Local 576 contract burdensome upon it, particularly in respect of provisions which fixed wage rates higher than the "case goods" industry level and which permitted officials of Local 576 to veto discharges.

In 1948 petitioner withdrew from a joint employer bargaining group, gave Local 576 notice of termination of the current contract pursuant to its terms, and preliminary to opening negotiations with Local 576 for a new contract called upon that organization for information respecting its compliance with the non-Communist affidavit requirements of the labor law. [R. 881-882, 885, 95, 97.] Local 576 ignored petitioner's inquiry. Later there was a series of bargaining meetings, initiated at petitioner's request. [R. 744-745, 1388.]

Meanwhile, a labor relations counselor whom petitioner had engaged for a short time [R. 738-741], and who had a previous friendly acquaintance with a Carpenters Union official [R. 600, 1336], gave that union a list of the names and addresses of petitioner's employees. [R. 606.] This was information which Local 576 already had; moreover, under its contract Local 576 also had ready access to petitioner's employees on the job—a privilege which the Carpenters Union did not have. [R. 537-538, 1282-1283; Board Ex. 8—not printed.] The Car-

penters Union used the list for the purpose of sending out one mailing piece in an unsuccessful attempt to secure membership applications from petitioner's employees. [R. 97, 582, 422-423, 619.] The Court of Appeals sustained the Board's finding that by furnishing the list to the Carpenters Union, petitioner committed an unfair labor practice. [R. 1509-1510.]

Petitioner soon engaged a new labor relations counselor, and, acting on his advice, opened negotiations with Local 576 for a new labor contract with it. (Petitioner did not recognize or negotiate with the Carpenters Union until the following year, after the Labor Board had conducted an election and certified that organization as the exclusive bargaining representative of petitioner's employees.)

While the negotiations with Local 576 were in progress petitioner's representatives called meetings of employees and discussed with them its own proposals and those of Local 576. The Labor Board's trial examiner made findings of fact [R. 57-88] which included the following:

That one of petitioner's partners had "made statements implying, if not stating, that Local 576 was nothing but a 'bunch of Communists and crooks.'" [R. 65.][5]

That petitioner had attempted to convince individual employees that Local 576 was wrong in telling them that petitioner's job evaluation plan resulted in lower wages [R. 64];

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[5]Petitioner's request for leave to offer evidence of the truth of the statements attributed to it was denied by the Board, which considered the proffered evidence immaterial. Among other things petitioner referred to a public announcement by the Board's General Counsel of his finding of probable cause to believe that officers of the parent international of Local 576 had filed false non-Communist affidavits [R. 105-110, 112-113].

That petitioner had argued to its employees that its plan was as good, if not better, than that of Local 576 [R. 65];

That petitioner had attempted to prove to employees that the contract offered to Local 576 by petitioner was better than the contract requested by Local 576 [R. 65];

That petitioner had "belittled" the contract demands of Local 576 [R. 75]; and

* * * * * * * * *

That one of petitioner's partners had stated that the partners had already made enough money to live on and were only keeping the plant open for the convenience of the employees. [R. 65.]

Upon certain of his findings of fact [R. 57-77], including the foregoing, and in particular upon his finding that petitioner had "belittled" the contract demands of Local 576 to individual employees [R. 75], the trial examiner found that petitioner had interfered with the administration of the Carpenters Union and rendered illegal assistance to that organization in violation of Section 8(a)(1) and (2) of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 158(a) (1) (2)). [R. 77.]

The trial examiner also found that one of petitioner's partners stated that petitioner would not sign a contract with Local 576.[6]

Upon review the Labor Board adopted the trial examiner's findings with exceptions not here material and further found that petitioner had committed an unfair labor

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[6]This despite the undisputed fact that petitioner had offered Local 576 contract proposals, the acceptance of any of which by Local 576 would have resulted in a contract.

practice by "disparaging Local 576 to its members." [R. 115-116.] In the Board's view petitioner's "major effort at disparagement of the CIO" was made at meetings and conferences with employees at which petitioner "emphasized that the [contract] changes which it was demanding were moderate ones, and that the claims of Local 576 were too exacting." [R. 116.] The Board further stated by way of conclusion, but without giving any particulars, that

> "This opposition went beyond inducement to the employees to put pressure on their own bargaining representative to withdraw its demands. It was an attempt to coerce the employees to forsake the CIO, by inducing in them the belief that their employer could not possibly meet the demands of their bargaining representative." [R. 116.]

The Court of Appeals held that the statements of one of petitioner's partners

> "to the employees concerning Local 576 and the negotiations then in progress were more than expressions of views, argument or opinion within the meaning of Section 8(c) of the [Labor-Management Relations] Act." [R. 1510.]

In that Court's view "the statements had a definite coercive tendency, amounting to threats of a shutdown if Local 576 persisted in its demands," [R. 1510-1511], and "were part of a larger pattern of hostility to the CIO and active assistance to the AFL." [R. 1511.]

In November, 1948, the respondent's plant shut down for legitimate economic reasons, as the Board concedes. [R. 66-67.] At the time of the shutdown all the employees were members of Local 576. [R. 177.] Several members of Local 576 were kept at work throughout the shutdown. [R. 825-826, 837.]

Early in 1949 plant operations began to resume gradually. Since the Local 576 contract had expired, petitioner was at liberty to and did offer wage rates lower than those formerly prevailing under the contract. The Board concedes that petitioner had the right to do this. [R. 127.]

In restaffing its plant petitioner recalled some of its former employees, all of whom were Local 576 members, and recruited new employees from several sources, including the Carpenters Union, to which petitioner had frequently resorted in the past. The Board found that Sam Ronney, the partner in charge of personnel, "did not in fact limit employment opportunities to members of [the Carpenters Union] exclusively, but was prepared to hire competent employees who came to him from any source other than [Local 576]." [R. 117.] The Board further found that petitioner

> "may have sincerely believed that [Local 576] members would be unwilling to work for the wages it was prepared to pay after the plant reopened, and that it was therefore futile to recall any of its former employees." [R. 117.]

Despite the foregoing findings the Board concluded that in restaffing its plant upon the resumption of operations following the shutdown the petitioner engaged in the discrimination which is declared an unfair labor practice by Section 8(a)(3), Labor-Management Relations Act, 1947 (29 U. S. C., Sec. 158(a)(3)). [R. 117-119.] The Board found discrimination against seven employees, awarded back pay to all of them, and directed the reinstatement of five of them. [R. 132-133.] The Court of Appeals eliminated one employee from the reinstatement order and in all other respects enforced the Board's order. [R. 1519-1526.]

Without unduly extending this petition the evidence respecting alleged discrimination cannot here be analyzed in detail but certain fundamental matters may be mentioned.

The Board's conclusion as to discrimination by failure to recall certain former employees to work rests upon the assumption that in the absence of unlawful discrimination they would have been recalled. The Board made that assumption although it refused to make any finding respecting the efficiency of the employees in question—an issue which was fully tried and upon which an abundance of evidence was adduced. And the Board's assumption was made despite uncontroverted evidence that (1) five of the seven employees in question were women who had been hired during the wartime manpower shortage; (2) after the war the petitioner adopted a policy of replacing women employees with men; (3) the petitioner had repeatedly attempted to discharge the 5 women before the shutdown and had secured the assent of the Local 576 shop committee thereto, but their discharge was prevented by the veto of higher Local 576 officials under contract restrictions then in force; (4) petitioner hired no women employees after resuming operations following the shutdown; (5) the work of the two male employees involved had been the subject of complaints before the shutdown; and (6) some Local 576 members were retained throughout the shutdown and others were later recalled.

The Carpenters Union was certified by the Board as collective bargaining representative of petitioner's employees following an election. The Board found that in deciding whether and when to recall former employees or recruit new ones the petitioner was motivated by a desire to control the result of the election, although the election was held later at the request of the Carpenters Union

and the record does not show how, when the plant was being restaffed, the petitioner could have known whether an election would later be held, or if so, when.

By virtue of noncompliance with the non-Communist affidavit and other requirements of the law Local 576 was disqualified to participate in the election proceedings, so that no purpose would have been served by notifying Local 576; the Board could not properly have refused or delayed the election for the benefit of Local 576. Yet in finding petitioner guilty of unfair labor practices the Board placed reliance on petitioner's omission to notify the Labor Board of the claimed interest of Local 576 in the election proceedings.

Reasons for Granting the Writ.

1. Upon the constitutional freedom of speech issue the decision of the Court of Appeals is probably in conflict with that of this Court in *Virginia Electric & Power Co. v. Labor Board,* 314 U. S. 469, and in conflict with the principle of *Thomas v. Collins,* 323 U. S. 516, and *Thornhill v. Alabama,* 310 U. S. 88. In construing the "free speech" proviso of the Taft-Hartley Act, the instant decision conflicts in principle with the decision of the Court of Appeals for the Third Circuit in *Pittsburgh Steamship Co. v. N. L. R. B.* (C. A. 3), 180 F. 2d 731 (affirmed, 340 U. S. 498), and with an earlier decision by a different panel of judges of the Ninth Circuit; *N. L. R. B. v. O'Keefe & Merritt Mfg. Co.* (C. A. 9), 178 F. 2d 445.

The conclusions of the Labor Board that petitioner had committed unfair labor practices rest in part on findings of fact to the effect that petitioner "disparaged" Local 576, "belittled" its contract demands, "implied" or "stated" that it was "nothing but a 'bunch of Communists and crooks,' "

"argued" the merits of the employer's contract proposals. etc. Of course all of these communications are expressions of "views, arguments, or opinion" and none of them contains any "threat of reprisal or force or promise of benefit." (29 U. S. C., Supp. V, Sec. 158(c).)

The opinion of the Court of Appeals mentions "threats of a shutdown." [R. 1511.] The only finding to which the court's remark could be intended to refer is one of the trial examiner's to the effect that one of petitioner's partners told employees that the partners had made enough money to live on and were only keeping the plant open for the convenience of the employees. [R. 65.] If made, such a remark would have been merely silly; it did not contain any threat of reprisal or force or promise of benefit. And even if it could be thought that the remark in question contained a threat, that would not infect other communications which were plainly uncoercive expressions of views, argument, or opinion.

Besides referring to "threats of a shutdown" the Court of Appeals remarked that the statements of petitioner's partner "were part of a larger pattern of hostility to the CIO and active assistance to the AFL." [R. 1511.]

In *Virginia Electric & Power Co. v. Labor Board,* 314 U. S. 469, this Court held that the First Amendment prohibited the Labor Board from making an unfair labor practice finding on the basis of an employer's utterance of matters of opinion, apart from other circumstances. Under the doctrine of that case the Board was still permitted to consider expressions of opinion as part of "the totality of the Company's activities" or of the employer's "whole course of conduct" in determining whether unfair labor practices had been committed. Accord: *May Dept. Stores Co. v. Labor Board,* 326 U. S. 376, 386.

In the instant case, although the Board used the phrase "course of action" [R. 115], it adopted the trial examiner's findings [R. 112], including one which specifically declared that by "belittling" the contract demands of Local 576 petitioner had violated Section 8(a)(1) and (2) of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 158(a)(1) and (2)). [R. 74, 75, 77.] And the Board's reference to petitioner's "disparagement" of Local 576 [R. 116], seems to indicate that the Board regarded that as an unfair labor practice in itself. It thus appears that apart from the employer's "whole course of conduct" and "the totality of the Company's activities" the Board considered expressions of opinion violative of the law. The action of the Court of Appeals in enforcing a Board order based on such findings was in conflict with the principle of the *Virginia Electric & Power* case, although the conflict is not apparent from the opinion of the Court of Appeals.

Public dissatisfaction with the administration of the National Labor Relations Act led in 1947 to the adoption of amendments, one of which provided that

> "the expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." (29 U. S. C., Supp. V, Sec. 158(c).)

The Court of Appeals for the Third Circuit has construed this amendment

> "to prevent the Board from using unrelated noncoercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

Pittsburgh Steamship Co. v. N. L. R. B. (C. A. 3), 180 F. 2d 731, 735.

Thus in the Third Circuit the amendment to the statute is viewed as having changed the rule of the *Virginia Electric & Power* decision. The same conclusion was reached in the Ninth Circuit in an earlier case decided by a panel of judges different from those who participated in the instant decision. *N. L. R. B. v. O'Keefe & Merritt Mfg. Co.* (C. A. 9), 178 F. 2d 445. But the Court of Appeals for the Seventh Circuit has held the amendment merely declaratory of the constitutional guarantee of freedom of speech, *i. e.*, that the doctrine of *Virginia Electric & Power* is still completely valid: *N. L. R. B. v. Kropp Forge Co.* (C. A. 7), 178 F. 2d 822, 828, cert. den. 340 U. S. 810. In *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498, 501n, this Court noted a question concerning the construction of Section 8(c) of the amended act but reserved judgment thereon.

In the instant case, the latest expression of the Ninth Circuit on the subject, the Court of Appeals considered certain non-coercive statements as "part of a larger pattern of hostility to the CIO" etc. [R. 1511.] Thus upon this question of obvious importance in the administration of the basic Federal labor law the doctrine of the Ninth Circuit agrees with that of the Seventh and conflicts with that of the Third. The views of the Third Circuit are supported by the legislative history (180 F. 2d 731, 735-736), and by the presumption that the amendment was intended to change existing law. The decisions of the Seventh and Ninth Circuits are to the contrary.

Special interest attaches to the question whether it is an unfair labor practice for an employer to tell employees that certain union officials are Communists. Under the

law as laid down by this Court such statements like the epithet "fascist," are expressions of opinion. *Cafeteria Employees v. Angelos,* 320 U. S. 293.

Prior to the 1947 labor law reforms the Labor Board regularly held that it was an unfair labor practice for an employer to tell employees that certain union officials were Communists; see, *e. g., Matter of Freisinger,* 10 N. L. R. B. 1043, 1052 (1939); and *Matter of Reliance Mfg. Co.,* 28 N. L. R. B. 1051, 1067, 1068 (1941). Such holdings by the Labor Board received widespread public condemnation which found expression in the Eightieth Congress. For example, Senator Ellender, one of the proponents of the reform legislation, commented unfavorably on such a Labor Board decision. 93 Daily Congressional Record 4261, April 28, 1947; 2 Legis. Hist. Labor-Management Relations Act. 1947, p. 1066.

Notwithstanding the legislative will as expressed in the 1947 amendment the Labor Board has persisted in its earlier course of decision, not only in this but also in other cases, *e. g., Matter of Wentworth Bus Lines, Inc.,* 92 N. L. R. B. 1356, 1363, 1365 (1951).

Current history teaches the wisdom of a policy permitting citizens to expose Communists and "crooks" without fear of punishment; see *e. g., American Communications Assn. v. Douds,* 339 U. S. 382, and recent press accounts of waterfront racketeering in the Port of New York. If such charges are maliciously false those who make them may be civilly liable for damages in forums other than the Labor Board. In such actions the truth is always a defense. But in the instant case the Board even refused to receive evidence to establish the truth of the statements which it condemned, and this after the Board's own General Counsel had found probable cause to believe that officials of the union involved had filed

false non-Communist affidavits. Here the Board's procedure went beyond mere error and reached absurdity.

2. In the instant case the Labor Board condemned petitioner's action in furnishing one union information which another already had, viz.: employees' names and addresses. The Court of Appeals approved the Board's action. The decisions of the Court of Appeals and of the Labor Board are in principle conflicting with the decision of this Court in *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206. In that case this Court approved a Labor Board order directing a shipowner to grant passes to agents of one union to board vessels for organizing purposes, it appearing that another union already enjoyed that privilege under a contract with the employer. Thus, at the instance of the Board, this Court held it to be an unfair labor practice for an employer to refuse equal organizing privileges to different unions. In view of that holding the Board is certainly not authorized now to condemn an employer for granting equal privileges. The decision of the Court of Appeals in the instant case is also in principle conflicting with decisions in the First and Fourth Circuits. *N. L. R. B. v. Brown* (C. A. 1), 160 F. 2d 449, 454; *N. L. R. B. v. Clinchfield Coal Co* (C. A. 6), 145 F. 2d 66, 69.

3. In the instant case the Court of Appeals rejected petitioner's contention that the Board lacked jurisdiction under Section 9(h) of the Labor-Management Relations Act, 1947 (29 U. S. C., Supp. V, Sec. 159(h)) to issue a complaint based on charges filed by individuals who were, as petitioner contended, "fronting" for a union disqualified to invoke Labor Board action.

The "fronting" device has been recognized and condemned by the Courts of Appeals for the Fifth and Sixth

Circuits: *N. L. R. B. v. Happ Bros.* (C. A. 5), 196 F. 2d 195; *N. L. R. B. v. Alside* (C. A. 6), 192 F. 2d 678. Mere solicitation and preparation of charges by a disqualified union has been held not to prevent prosecution of a complaint on charges of unfair labor practices limited to the charging parties: *N. L. R. B. v. Augusta Chemical Co.* (C. A. 5), 187 F. 2d 63. The criterion appears to be whether the charging party seeks relief for himself alone or for others as well. In the instant case the charges referred to employees other than the charging parties and the complaint which issued thereon sought to dislodge the Carpenters Union as bargaining agent and invalidate its contract, obviously for the benefit of Local 576.

Although it is not clear it appears probable that the decision of the Court of Appeals in the instant case conflicts in principle with the decisions of the Fifth and Sixth Circuits in the *Happ* and *Alside* cases. In any event it is obviously important to the administration of the labor law for this Court to decide whether and under what circumstances the statute can be effectively frustrated, as it has been so far in this case, by a disqualified union acting through individuals "fronting" for it.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. PERKINS,

A. ANDREW HAUK,

Counsel for Petitioner.

November 18, 1953.

APPENDIX.

(Relevant provisions of the Labor-Management Relations Act, 1947—61 Stat. 136, 29 U. S. C., Supp. V, Secs. 150 *et seq.*)

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * * * * *

Sec. 9. (h) No investigation shall be made by the Board of any question affecting commerce concerning the

representation of employees, raised by a labor organization * * *, and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *

and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by * * * the Supreme Court of the United States upon writ of certiorari * * * as provided in sections 239 * * * of the Judicial Code, as amended (U. S. C., title 28, secs. 346 * * *).

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 475

L. RONNEY AND SONS FURNITURE MANUFACTURING COMPANY, A COPARTNERSHIP CONSISTING OF SAM RONNEY AND MILTON RONNEY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1500-1519) is reported at 206 F. 2d 730. The Board's original and supplemental decision and order (R. 111-133, 54-94) are reported at 93 NLRB 1049 and 97 NLRB 891, respectively.

JURISDICTION

The judgment of the court below (R. 1520-1526) was entered on September 23, 1953. The petition

for a writ of certiorari was filed on November 23, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board, in concluding that petitioner had violated Section 8(a)(2) and (1) of the Act by rendering illegal assistance to Local 3161 (AFL), properly relied upon the subsidiary findings, among others, that petitioner (1) in order to coerce its employees to forsake Local 576 (CIO), their bargaining representative, had disparaged the contract demands of that union, and (2) had furnished a list of employees to Local 3161 (AFL) for the purpose of assisting it in recruiting members and ousting Local 576 (CIO) as the employees' bargaining representative.

2. Whether the court below properly held that the individual employees who filed the charges initiating the instant proceedings before the Board were not "fronting" for a disqualified union and that, therefore, the proceedings were not invalid.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*), are set forth in the Appendix to the petition, pp. 1-3.

STATEMENT

I. The Board's Findings of Fact

The Board found that petitioner, in violation of Section 8(a)(2), (3) and (1) of the Act had ille-

gally assisted the Furniture Workers Union, Local No. 3161 of the United Brotherhood of Carpenters & Joiners of America, AFL, hereafter called Local 3161 (AFL); had discriminatorily refused to rehire former employees because of their membership in Local 576, United Furniture Workers, CIO, hereafter called Local 576 (CIO); and by these and other acts and statements had interfered with, restrained and coerced its employees in the exercise of their right to remain members of the labor organization of their choice. The Board's subsidiary findings may be summarized as follows:

In 1948 Local 576 (CIO) was the bargaining representative of petitioner's employees, and it and petitioner were parties to a collective bargaining contract which by its terms was to expire in September 1948 (R. 60; 207). Shortly before the expiration of the contract, petitioner, dissatisfied with Local 576 (CIO) because its wage rates were higher than those prevailing in competitive shops under A. F. of L. contracts (R. 60, n. 6; 258-261, 876-880), notified Local 576 (CIO) of its intention to terminate the contract on its anniversary date, September 1, 1948 (R. 61; 793, 185-186). At about the same time petitioner's general manager, Ronney, learned from one Brodine, a labor relations consultant, that the A. F. of L. was going to charter a new local in the furniture field in the Los Angeles area and that the contract to be offered by this local would be much more advantageous to employers than the Local 576 (CIO) contract (R. 60; 798-801,

937). Brodine stated that the A. F. of L. would attempt to induce petitioner's employees to join this union if Ronney would give him a list of the employees with their addresses (R. 60; 740-741, 798-799, 885-888, 937).

Following Brodine's suggestion, petitioner compiled a list of its employees with current addresses (R. 61; 740, 937, 376-379, 414, 432-433, 455-457, 518-520) which it gave to Brodine, who in turn transmitted it to the business representative of the Los Angeles District Council of Carpenters (R. 61; 595-596, 630).[1] On August 11, the District Council of Carpenters, using the list furnished by petitioner, sent all of petitioner's employees a letter asking them to join the A. F. of L. (R. 62; 433-435, 594-608, 581-582, 422-423, 425, 377-379, 419-420, 431-432, 455-456, 519-521, 545-546, 561-564).

Soon after its employees were circularized by the A. F. of L., petitioner replaced Brodine and engaged a new consultant (R. 62; 740-741, 793). The new consultant, learning that Ronney had given the A. F. of L. a list of employees, stated that "that wasn't the thing to do, that [Sam Ronney] had made a mistake and should have no dealings with any unions other than the CIO," with which the employees were affiliated (R. 61; 740-741, 942-943, 888-889). Petitioner, following this advice, resumed negotiations with Local 576 (CIO) (R. 63; 889, 746-747). In August 1948, it submitted to Local 576 (CIO) a proposed contract which was

[1] The District Council had jurisdiction over A. F. of L. locals of furniture workers.

patterned substantially after the A. F. of L. master contract (R. 63; 889-891).

For months the parties engaged in fruitless negotiations. During this period, petitioner's officials discussed the progress of negotiations directly with groups of employees in the plant during rest periods and at several formal meetings (R. 64-66, 116; 760-762). General Manager Ronney stated that his purpose in calling those meetings was to have his position taken in negotiations stated directly to the employees and not have it relayed to the employees through their union (R. 903). Ronney, who was most often petitioner's spokesman on these occasions, told the employees that his proposals were as good as, if not better than, those offered by their union (R. 116, 64-65; 392-393, 487, 516-517, 449, 548, 375, 569, 294). On different occasions during these gatherings he told them that he was not going to sign a contract with the CIO (R. 65-66; 297, 549, 525); that the employees could earn more money without a union (R. 395, 449); that he had earned enough money to live on and was operating the plant only as a favor to the workers (R. 65; 297, 379-380, 405, 431, 449, 549, 656-657); and that before he would let the union run his plant he would close it down (R. 405, 431, 526, 533-534, 568, 1410).

With the parties still in disagreement over a new contract, petitioner, for economic reasons, closed the plant on November 19, 1948 (R. 66; 190).[2] The

[2] Petitioner retained a skeleton crew consisting of some foremen and four of its highest paid production employees (R. 836-837, 826, 823-825).

employees, numbering about 45 (R. 823-825), were told that the layoff was for an indefinite period, but that they would be recalled upon reopening (R. 67; 300, 362-363, 416, 457-458, 522-523, 659). It had been customary in previous layoffs for petitioner to recall the employees by telephone or telegram when the plant was ready to resume operations (R. 67; 815-816, 369, 402-403, 446-447, 482-483, 540-541, 556-557, 655).

Early in January 1949, petitioner began gradually to resume operations (R. 67-68; 826-827, 837-838). Coincidentally, the A. F. of L. renewed its interest in the plant and one of its affiliates, Local 3161, began organizational activities (R. 1141). Contrary to its usual policy, and to the promise it had made at the time of the layoff, petitioner did not at this time recall any of the old employees, except two,[3] who had been members of Local 576 (CIO) (R. 177, 68; 827, 867, 912). Moreover, Ronney's secretary was under instructions not to call Local 576 (CIO) for new employees (R. 68, 117; 869-870, 911-912). Instead, he ordered her to call the hiring hall of Local 3161 (AFL) and other employment agencies for new employees (R. 68, 117; 911, 1123, 1143). As a result, almost all of the new employees hired during January and February were members of Local 3161 (AFL) who were referred by that union (R. 117; 1122-1123). By February 25, 1949,

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[3] Bill Gipson, the janitor, was recalled the first of January (R. 68; 694-695). Petitioner also offered one other former employee, Harold Sushan, a job at this time, but filled it with someone else a short time later while Sushan was considering the offer (R. 118, 128; 303-306, 1053-1054).

the eligibility date for voting in a representation election which had been requested by Local 3161 (AFL),[4] petitioner had hired sixteen employees (supplementing the four old employees retained throughout (see n. 3, p. 6, *supra*)). Of these sixteen, only one was a former employee (*ibid.*). Of the fifteen new employees, a large majority, hired through the offices of Local 3161 (AFL), was made up of members of that organization (R. 1123, 253, 250-253, 1155-1170, 712-713, 826-827). After February 25, the date on which voting eligibility was fixed, petitioner offered employment to three of its old employees (R. 118; 659-660, 846-848, 1014-1015).

On February 17, 1949, while petitioner was in the process of restaffing with employees referred by Local 3161 (AFL), petitioner and Local 576 (CIO) met in bargaining negotiations for the last time. After a heated discussion the meeting adjourned with the understanding that a state conciliator would transmit petitioner's final written proposal to Local 576 (CIO) (R. 68-69; 197).

On February 23, 1949, the day before the conciliator transmitted petitioner's offer to Local 576 (CIO), Local 3161 (AFL) filed with the Board a petition for certification as bargaining representative of petitioner's employees (R. 169-171). In its petition, submitted under oath, Local 3161 (AFL) represented that there was no "recognized or certi-

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[4] In February, Local 3161 (AFL) petitioned the Board for an election (R. 169). The list of eligible voters for this election was drawn from the payroll of February 25, 1949 (R. 167).

fied bargaining agent" at the plant nor "any other interested party" (R. 169-171, 1132). The petition also contained the sworn statement that the AFL Local represented 100 percent of the 24 employees then employed in the unit (R. 170).

On February 24, petitioner's "final offer" was transmitted to Local 576 (CIO) (R. 198-201). No further negotiations took place (R. 1000-1001). Four days later petitioner and Local 3161 (AFL), following negotiations held a few days earlier (R. 71; 952-954, 1008-1009), executed an agreement for a consent election as petitioned for by Local 3161 (AFL) (R. 165-168, 954). A list of eligible voters based on the February 25, 1949, payroll was established, thereby enabling the new employees, who were predominantly adherents of Local 3161 (AFL), to control the choice of representatives (R. 167; 712-713). The old employees, who were members of Local 576 (CIO), not having been rehired, were not on the voting register. On March 10, 1949, the election was held and Local 3161 (AFL) won unanimously. The Board's Regional Director certified Local 3161 (AFL) as the statutory representative of petitioner's employees (R. 164-165). After a few meetings with Local 3161 (AFL) petitioner, on April 5, 1949, executed a standard A. F. of L. contract (R. 71; 726-733, 802, 1004-1008).

This contract contained a union-security provision which in effect required incumbent employees to become members of the union immediately upon the signing of the contract; newly hired employees

were required either to make immediate application for union membership or to obtain work permits from the union and within 15 days thereafter make application for membership in the union (R. 71-73, Articles III and XII).

After executing this contract, petitioner resumed full operations at the plant, hiring only through the office of Local 3161 (AFL) (R. 74; 870-872). Meanwhile, a number of the old employees whom petitioner had failed to rehire filed charges with the Board initiating the present proceedings (R. 1-38).

II. The Board's Conclusions and Order

The Board concluded (R. 113-119, 74-77) that petitioner, in violation of Section 8(a)(1) and (2) of the Act, had rendered illegal assistance to Local 3161 (AFL) in order to oust Local 576 (CIO) as the bargaining representative of its employees, and had interfered with its employees' right to select their own representative and remain members of the organization of their choice. In summary, petitioner's illegal course of conduct included the submission of a list of employees to the District Council of Carpenters (AFL), with which Local 3161 (AFL) was affiliated, to assist it in organizing the employees; disparagement of the contract demands of Local 576 (CIO) to its members, coupled with threats to close down the plant; denial of any opportunity to Local 576 (CIO) to furnish employees to restaff the plant and making hiring arrangements which favored Local 3161 (AFL); execution and maintenance of a contract with Local

3161 (AFL) which by reason of its illegal union-security provisions lent support to that union in recruiting and maintaining its membership; and the discriminatory refusal to rehire its laid-off employees because of their membership in Local 576 (CIO).

The Board further concluded (R. 118-119, 77-86) that petitioner had violated Section 8(a)(3) of the Act by discriminating against its laid-off employees and by executing and maintaining the contract with Local 3161 (AFL) which, contrary to the requirements of the Act, failed to allow either old or newly hired employees the requisite 30-day period within which to become members of the union.

The Board's order (R. 120-122) requires petitioner to cease and desist from engaging in the unfair labor practices found and from engaging in any like or related violations of the Act. Affirmatively, the order directs petitioner to reimburse seven employees who were discriminatorily refused reemployment for any loss of pay caused by the discrimination against them and to offer reinstatement to five of them; to withdraw recognition from Local 3161 (AFL) as the representative of its employees unless and until this organization is certified by the Board; and to post appropriate notices (R. 122-126, 132-133).

III. The Decision of the Court Below

The court below, enforcing the Board's order in full except in one respect not material here (R.

1500-1519), held that the Board's findings were "fully sustained by the record" (R. 1509-1517). The court rejected petitioner's contention that the proceedings before the Board were invalid because, according to petitioner, the charges initiating the proceedings were filed by individuals "fronting" for Local 576 (CIO) which assertedly had not complied with the filing requirements of Section 9(h) of the Act. The court, declaring it unnecessary to determine whether Local 576 (CIO) was in compliance,[5] stated (R. 1501-1502):

> In the instant case the unfair labor practice charges were signed and filed with the Board by 10 former employees of respondent [petitioner here], each alleging discrimination and other unfair labor practices as against himself or herself individually. The charges were in form and in substance assertions of individual rights. They were not made less so because Local 576 assisted or directed the employee in preparing the charges, or because counsel for Local 576 represented the employees at the Board hearing, or because Local 576 might incidentally benefit from the Board's order. The problem is essentially the same as in N.L.R.B. vs. Globe Wireless, 9 Cir., 193 F. 2d 748, note 1, where we quoted with approval from N.L.R.B. vs. Augusta Chemical Co, 5 Cir., 187 F. 2d 63,

[5] According to the Board's records Local 576 (CIO) was ostensibly in compliance. However, a question had arisen whether certain individuals connected with the union were officers within the meaning of Section 9(h) and whether it was therefore necessary for them to file the non-Communist affidavits required by that Section as a pre-condition to the union's eligibility to bring cases to the Board.

64, as follows: " 'Granted that the disqualified union was active in assisting, indeed in directing, the employees in preparing their charges, it does not at all follow that the employees, by accepting that assistance, disqualified themselves.' "

ARGUMENT

1. In seeking review of the decision below approving the Board's conclusion that petitioner had engaged in a course of illegal assistance to Local 3161 (AFL), petitioner singles out for challenge two subsidiary findings upon which the Board relied and a third which petitioner ascribes to the Board but upon which the Board did not in fact rely. Putting aside the consideration that the Board's order as enforced by the court below is adequately supported by the record even without regard to these challenged findings (*supra,* pp. 2-10),[6] petitioner's assertion that the findings were improper is, in any event, insubstantial and presents no question warranting certiorari.

Petitioner's contention (Pet. 14-17) that its disparaging statements concerning the contract demands of Local 576 (CIO) fall within the protection of Section 8(c) of the Act overlooks the fact that these statements were coupled with warnings that petitioner would not sign a contract with the union and that it would close the plant rather than

[6] Petitioner questions (Pet. 3-5) the adequacy of the evidence supporting some of the other findings, but this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 503.

do so. In this context, the statements were plainly designed, as the Board found (R. 116), to coerce the employees to foresake Local 576 (CIO). The court below properly concluded, therefore, that petitioner's "statements to the employees concerning Local 576 and the negotiations then in progress were more than mere expressions of 'views, argument or opinion' within the meaning of § 8(c) of the Act. The statements had a definitely coercive tendency amounting to threats of a shutdown if Local 576 persisted in its demands" (R. 1510-1511).

The decision below in this respect does not, contrary to petitioner's assertion, conflict with the decision of the Court of Appeals for the Sixth Circuit in *Pittsburgh Steamship Co.* v. *National Labor Relations Board,* 180 F. 2d 731, affirmed, 340 U.S. 498. There the court merely held that Section 8(c) precludes the Board from relying upon "unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct." 180 F. 2d at 735. In the context of petitioner's opposition to Local 576 (CIO) and assistance to Local 3161 (AFL), the statements made by petitioner to its employees concerning Local 576 (CIO) cannot be viewed as isolated non-coercive expressions of opinion nor can it reasonably be said that the Sixth Circuit, in the light of other related decisions of that Court, would so regard them. See *National Labor Relations Board* v. *Valley Broadcasting Company,* 189 F. 2d 582, 586; *National Labor Relations Board* v. *Bailey Company,* 180 F. 2d 278, 280.

Also without merit is petitioner's contention

(Pet. 19) that the decision below, insofar as it holds that petitioner violated the Act by furnishing a list of its employees to the AFL, conflicts in principle with *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U.S. 206; *National Labor Relations Board* v. *Brown Co.*, 160 F. 2d 449 (C.A. 1); and *National Labor Relations Board* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C.A. 4). The claim of conflict based upon the erroneous premise that petitioner merely granted the AFL equal privileges with Local 576 (CIO), overlooks the important distinction which the court below stressed. An employer may under some circumstance be required to grant equal privileges to rival unions. "But here," as the court below observed (R. 1510), "the AFL had shown no interest in [petitioner's] plant prior to the time [petitioner] sent it the list. Because of its preference for the terms of the AFL contract [petitioner] invited a raid on the CIO membership in its plant and furnished the means for conducting such raid. This was interference and assistance which the law does not allow."

Petitioner contends further (Pet. 17-19) that the Board's decision is also erroneous in that it is based upon petitioner's statement to its employees implying that Local 576 (CIO) was nothing but "a bunch of Communists and crooks." But petitioner misreads the Board's decision. While the trial examiner found that this statement had been made (R. 65), neither the Board nor the trial examiner (R. 74-76, 113-116) relied upon it in reaching the conclusion that petitioner had illegally as-

sisted Local 3161 (AFL). The "major effort at disparagement" which the Board and the trial examiner took into account was petitioner's belittling of the union's contract demands in an effort to "coerce the employees to forsake the CIO, by inducing in them the belief that their employer could not possibly meet the demands of their bargaining representative" (R. 116, 75).

2. Petitioner's contention that the proceedings before the Board were invalid because the charges initiating those proceedings were filed by individuals assertedly "fronting" for a disqualified union presents no question for review. Essentially, this aspect of the case poses an evidentiary issue. The court below concluded (*supra*, pp. 11-12), correctly, we think, that in the instant case the employees who filed the charges were in fact acting on their own behalf for the vindication of their own statutory rights rather than as representatives of a disqualified union and that, accordingly, a complaint had properly issued on their charges.[7] The

[7] Cf. *National Labor Relations Board* v. *Coal Creek Coal Company*, 204 F. 2d 579, 582 (C.A. 10); *Southern Furniture Manufacturing Company* v. *National Labor Relations Board*, 194 F. 2d 59, 60-61 (C.A. 5), certiorari denied, 343 U.S. 964; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 749, n. 1 (C.A. 9); *W. T. Rawleigh Company* v. *National Labor Relations Board*, 190 F. 2d 832, 836 (C.A. 7); *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443-444 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Augusta Chemical Company*, 187 F. 2d 63, 64 (C.A. 5). The results reached in *National Labor Relations Board* v. *Happ Brothers Company, Inc.*, 196 F. 2d 195, 197-198 (C.A. 5) and *National Labor Relations Board* v. *Alside, Inc.*, 192 F. 2d 678, 679-680 (C.A. 6), cited by petitioner, merely turn, not upon any difference in principle, but upon the differing particular facts of those cases.

court's resolution of this factual issue should be left undisturbed on the basis of this Court's " 'usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations'." *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 503.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1954.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 475.

L. RONNEY AND SONS FURNITURE MANUFACTURING COMPANY, a copartnership consisting of SAM RONNEY and MILTON RONNEY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

Preliminary Statement.

In important respects the brief in opposition is deficient and misleading in its treatment of the record. This reply brief is presented primarily by way of correction. Not all of the errors and significant omissions can be noticed in this reply brief without unduly extending it. We shall therefore refer only to those of most importance in relation to the question whether the writ of certiorari should be granted.

ARGUMENT.

I.

Petitioner's "Disparagement" of Local 576 and Its Contract Demands.

A. Statements Upon Which the Board Admittedly Relied.

The brief in opposition admits that in making its order against petitioner the Labor Board relied on findings as to petitioner's "disparaging statements concerning the contract demands of Local 576" (Br. in Opp., pp. 9, 12) and "statements to its employees concerning Local 576" (Br. in Opp., p. 13).

The "disparaging statements" upon which the Labor Board concededly relied evidently included "belittling of the Union's contract demands" (Br. in Opp., p. 15) and telling employees that petitioner's "contract proposals were as good as, if not better than, those offered by their union" (Br. in Opp., p. 5).

Petitioner respectfully submits that "belittling" another's contract demands is "the expressing of . . . views, argument, or opinion" *per se,* and as such is clearly entitled to the protection of Section 8(c) of the Labor-Management Relations Act, 1947.

The Labor Board found that petitioner had "belittled" the contract demands of Local 576 "in an attempt to coerce the employees to forsake the CIO by inducing in them the belief that their employer could not possibly meet the demands of their bargaining representative" [R. 116]. Nothing is gained by the use of the affective term "coerce." The effect produced in the mind by the communication of "views, argument, or opinion" cannot properly be called "coercion" even in the idiom of advocacy. For one bargainer to say that he cannot afford to pay

the other's price is, we suppose, a tactic as old as trade. Unions would indeed be fragile creatures if their adherents could not hear such a remark without being, as the Labor Board says, "coerced." We suggest that they are not.

The only specific instance of "belittling" the Union's contract demands which is cited in the brief in opposition is the petitioner's statement to employees that its contract "proposals were as good as, if not better than, those offered by their Union" (p. 5). That statement would seem to be the pure expression of "views, argument, or opinion" within the meaning of Section 8(c).[1]

Apparently the Government does not now contend that the statements just referred to were in and of themselves anything other than the expression of views, argument, or opinion. The brief in opposition does assert that those statements were "coupled with warnings," etc., and that in their "context" the statements were "plainly designed to coerce the employees to forsake Local 576" (pp. 12, 13). To this there are several cogent answers.

(a) The Labor Board made no finding as to the "context" of the statements or as to their being "coupled with warnings." The alleged "context" and "coupling" are belated discoveries of the brief writer. The Board found that petitioner had committed an unfair labor practice by "disparaging Local 576 to its members" [R. 115-116]—this without regard to "context" or "coupling" with anything else.

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[1]The recital of the facts in the brief in opposition may give the impression that petitioner discussed with employees proposals which it had not made to the Union [Br. in Opp., p. 5, citing R. 903]. That is not the fact [R. 904].

The Board's trial examiner, with no reference to "context" or "coupling" with anything else, found that petitioner had committed an unfair labor practice by "belittling the contract demands of Local 576 to the individual employees" [R. 74, 75]. The Board adopted that finding [R. 112, 115]—again without any qualification as to "context" or "coupling." In the absence of a finding on the subject Labor Board counsel are not entitled to rely upon "context" (*Virginia Electric & Power Co. v. Labor Board,* 314 U. S. 469).

(b) The "context" and "warning" to which Labor Board counsel now attribute significance are not accurately related in the brief in opposition. It is there said (pp. 12-13) that the petitioner's "disparaging statements" "were coupled with warnings that petitioner would not sign a contract with the Union and that it would close the plant rather than do so."

There is no evidence and no finding that petitioner ever said it would close the plant rather than sign a contract with the Union. Petitioner may have said that it would shut down rather than let the Union run its plant [R. 405, 431, 526, 533-534, 568]. Any self-respecting employer might well say the same thing. Such a remark would certainly not be unfair labor practice.

Petitioner operated its plant under a contract with Local 576 from 1939 to September 1, 1948 [R. 58-59]. In August, 1948, while a contract with Local 576 was in effect, petitioner opened negotiations with that Union and submitted to it a proposal for a new contract (Br. in Opp., pp. 4-5). If Local 576 had chosen to accept that proposal of course it would have had a contract. But the parties remained in disagreement, although petitioner

argued to its employees the merits of its proposals for a written contract with Local 576 (Br. in Opp., p. 5).

Despite the above findings which clearly show petitioner's offer of a contract to Local 576 and employees' knowledge thereof, the brief in opposition refers to a "warning" that "petitioner would not sign a contract with the Union" (Br. in Opp., p. 12). In support of this assertion Labor Board counsel have cited scraps from the testimony of witnesses who contradicted themselves and the Board's findings on this point.[2]

(c) Even if, contrary to the record, petitioner had announced unwillingness to sign a contract with Local 576, that would have no significance in this case, whether as "context," "warning," or otherwise. Petitioner was privileged to decline to deal with Local 576 at all. That being so, petitioner's asserted "warning" that it would not sign a contract could not serve as "context" to outlaw other lawful utterances.[3]

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[2]The brief in opposition (p. 5) cites three witnesses: Sushan [R. 297]; Clinton [R. 549]; and Montgomery [R. 545]. Sushan admitted attending meetings at which there was discussed "the CIO contract that Sam Ronney wanted us to sign" [R. 295]. Clinton's testimony was to the effect that Ronney said he was not going to sign the Local 576 contract proposal [R. 525]; he offered his own contract proposal [R. 548]. Montgomery admitted that Ronney proposed a contract [R. 516-517].

[3]An employer's refusal to bargain with a labor organization may be held an unfair labor practice if (1) the labor organization is found to be the exclusive representative of employees under Section 9(a), (2) it is qualified under Section 9(h), and (3) such refusal to bargain is made the subject of a complaint. None of those conditions was fulfilled here. The Labor Board could not have relied on any refusal to bargain with Local 576 without violating the legislative policy of withholding relief from disqualified labor organizations: Section 9(h).

Thus upon analysis the "context" and "warnings" upon which Board counsel now rely (but upon which the Board did not rely) come to nothing.

(d) In any event, reference to "context" does not permit the Labor Board to base unfair labor practice findings on evidence of communications which do not contain any "threat of reprisal or force or promise of benefit" (Section 8(c).) The argument of Labor Board counsel as to "context" ignores the 1947 "free speech" amendment of the statute. Section 8(c) was intended to be remedial (*International Brotherhood of Electrical Workers v. Labor Board,* 314 U. S. 694, 704). The rule of *Virginia Electric & Power Co. v. Labor Board,* 314 U. S. 469, must be deemed altered in so far as it would have permitted resort to "context" in order to find labor practices on the basis of communications containing no threat or promise.

B. Petitioner's Statement to Employees That Local 576 Was "Nothing but a Bunch of Communists and 'Crooks.'"

The petition pointed out that the Board's order w in part based on the finding that petitioner had inform employees that Local 576 was "nothing but a bunch Communists and 'crooks.'" The brief in opposit asserts (p. 14) that neither the Board nor the trial ex iner relied on that finding. Let us look at the record.

The trial examiner made a finding of fact to that e [R. 65] and took enough interest in it to emphasize Sam Ronney substantially admitted having made the s ment attributed to him [R. 65 n. 8.]

This was included in the recital of findings of fact [R. 57-74] upon the basis of which the trial examiner concluded that petitioner had committed unfair labor practices [R. 77].

"Upon consideration of the entire record" the trial examiner was convinced that petitioner's conduct indicated an attitude of opposition to the Act generally [R. 88]. His conclusions of law and recommendations were based on all of the findings of fact and upon the entire record [R. 88].

The Board adopted the trial examiner's findings of fact with certain exceptions [R. 112]. The Board specifically found, although the trial examiner had not, that petitioner had committed an unfair labor practice "by disparaging Local 576 to its members" [R. 115-116]. We earnestly invite the Court's attention to this: *The only "disparagement" of Local 576 to its members which appears in the findings of either the Board or its trial examiner was the employer's statement concerning "Communists and 'crooks'"* [R. 65]. Thus the Board evidently did rely on the finding in question.[4] Evidence of the employer's statement [R. 760-762] was cited by Board counsel to the Court of Appeals in support of the Board's order (NLRB Br. in C. A. 9, p. 20, referring to pp. 7-8).

[4] This may be the "major effort at disgaragement" to which the Board referred [R. 116] as having taken place at meetings. Labor Board counsel now attempt (Br. in Opp., p. 15) to identify "disparagement of Local 576" with "belittling of the Union's contract demands," which is not at all the same thing.

II.

Petitioner's Grant of Equal Organizing Privileges to Local 576 and the Carpenters Union.

Counsel for the Labor Board now concede that "under some circumstances" an employer may be required to grant equal privileges to rival unions (Br. in Opp., p. 14). But they contend that petitioner did not have the right to furnish the Carpenters Union employees' names and addresses on a basis of equality with Local 576. The reason is said to be that "the AFL had shown no interest in petitioner's plant" and that petitioner "invited a raid on the CIO membership in its plant" (Br. in Opp., p. 14).

The fact is that the Carpenters Union was engaged in an organizing drive in the Los Angeles furniture industry, of which petitioner was a part [R. 419, 582, 595-596, 620]. But whether or not the Carpenters Union had previously shown interest is immaterial. Surely an employer's conduct is to be judged by the objective standard of equality of treatment. If an employer chooses to "invite a raid" on a Communist or corrupt union and does no more than furnish employees' names and addresses to a rival union the Government ought not to complain.

III.

Evasion of the Statute by a Disqualified Union Acting Through Individuals "Fronting" for It.

The brief in opposition asserts that the question of "fronting" was a factual issue resolved by the Court of Appeals. That is not so. The facts as to "fronting" are undisputed. (See Pet. for Cert., pp. 6-7, 19-20.) The legal question is whether on charges ostensibly filed by individuals the Labor Board was authorized to grant a disqualified union substantial relief such as invalidating its rival's contract and setting aside the election it had won. Consideration of that legal question by this Court fully accords with the principles governing the exercise of certiorari jurisdiction.[5]

IV.

The Effect of the Labor Board's Reliance on Findings and Evidence Which Do Not Support the Order.

The brief in opposition (p. 12) suggests, but does not argue, that the Labor Board's order may be supported on the basis of findings other than those petitioner has attacked. But whether the Board would have decided as it did if it had confined its attention to matters proper for its consideration is wholly speculative. "Whether there are sufficient findings and evidence of interference, restraint, [and] coercion . . . without reference to"

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[5]On December 10, 1953, the reconstituted Labor Board ordered Local 576 to show cause why it should not be disqualified under Section 9(h). (NLRB Release W-325, December 16, 1953.)

privileged and irrelevant matters is a question "for the Board to decide upon the evidence." (*Virginia Electric Power Co. v. Labor Board,* 314 U. S. 469, 479.) That question has not been decided. If upon review it is considered that other findings and evidence might have supported the order then a remand would be proper, as in the *Virginia Electric & Power* case.

Conclusion.

For the reasons stated in the petition and in this reply brief the writ of certiorari should be granted.

Respectfully submitted,

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